

No. **82-1512**

IN THE
**SUPREME COURT OF THE
UNITED STATES**

October Term, 1982

AAA LIQUORS, INC., a Colorado corporation; A-1 DISCOUNT LIQUORS, INC., a Colorado corporation; AL'S LIQUOR STORE, INC., a Colorado corporation; COLORADO LIQUORS, INC., a Colorado corporation; CRAZY FARMER LIQUOR, INC., a Colorado corporation; DAYTON LIQUORS, INC., a Colorado corporation; ARTHUR W. STENCIL, d/b/a DICKERSON'S LIQUOR; ROBERT N. SHACKLETT, d/b/a ELEVENTH AVENUE LIQUOR HOUSE; LORENZ and RUTH FRIEND, d/b/a FRIEND LIQUOR STORE; GLORIA DiMANNA, d/b/a GENO'S LIQUORS; IRVIN RUBIN, d/b/a JR LIQUORS; JOHN DeCICCO, d/b/a KIPLING LIQUORS; DEVON TALBERT, d/b/a NORTHGLENN LIQUORS; ROBERT McINTYRE, d/b/a OLD TOWN LIQUORS; HERMAN and DELORES FLAX, d/b/a SKYLINE LIQUORS; SAM FIREMAN and ARNO BRUCK, d/b/a TED'S LIQUORS; and THRONTON CORK'N BOTTLE, INC., a Colorado corporation,

Petitioners,

vs.

JOSEPH E. SEAGRAM AND SONS, INC., d/b/a CALVERT DISTILLERS COMPANY, BROWN VINTNERS COMPANY, and SEAGRAM DISTILLING COMPANY,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether "coercion" is an additional requirement of proof in an action involving consensual vertical price fixing where the Plaintiff is the retailer victim of the consensual agreement, combination or conspiracy between the distiller and wholesaler regarding the wholesaler's prices?

2. Whether a contract, combination or conspiracy between a distiller and its only wholesaler, in the relevant geographic market, to discriminate in prices charged to competing retailers is a form of price fixing which is a *per se* violation of Section 1 of the Sherman Act?

DESIGNATION OF PARTIES

The parties to this Petition are as designated in the caption.

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REFERENCE TO RECORD

Reference to Record below will be indicated by "Record Vol _____" or "Tr. p_____ (Transcript of evidence.)"

No. _____

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Respondents.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for Tenth Circuit entered on December 3, 1982 and the Order of that Court denying rehearing entered on February 10, 1983.

REFERENCE TO OPINIONS

The Opinion of the United States Court of Appeals for the Tenth Circuit was ordered published. Publication has not yet occurred. It is reproduced in Appendix B.

The Memorandum Opinion of the United States District Court for the District of Colorado was not published and is reproduced in Appendix A.

STATEMENT OF JURISDICTIONAL GROUNDS

(i) This Petition is brought to review an Opinion of the United States Court of Appeals for the Tenth Circuit, dated December 3, 1982, which affirmed a decision of the United States District Court for the District of Colorado, dated December 22, 1980.

(ii) A Petition for Rehearing was filed on December 16, 1982 and was denied on February 10, 1983 (Appendix C).

(iii) The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

STATUTORY PROVISIONS

The Statute primarily involved in this case is:

§1. *Restraint of trade; penalty.*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 12, 1975, P.L. 94-145, §2, 89 Stat. 801.)

STATEMENT OF THE CASE

A. Nature of the Proceedings

This case involved a trial to the Court on the issues of whether the Defendants' actions were in violation of Section 1 of the Sherman Act (15 U.S.C. 1), and/or in violation of Section 2(a) of the Robinson-Patman Act (15 U.S.C. 13(a)).

The nineteen (19) Plaintiffs alleged a vertical price fixing and price discrimination conspiracy, combination or contract between the Defendants and their sole wholesaler in the Denver Metropolitan Area with regard to certain Seagram products, especially Seagram 7 Crown and Seagram VO.

The fact and the amount of damages were stipulated pretrial as well as many of the facts. Evidence was taken in a two-day period on January 8 and 9, 1979. On January 10, 1979, final arguments were heard. The District Court below issued its Memorandum Opinion and Order on December 22, 1980 (Appendix A). Judgment entered for the Defendants on December 23, 1980. Notice of Appeal was filed on January 14, 1981.

On December 3, 1982, the United States Court of Appeals for the Tenth Circuit announced its decision affirming the judgment of the District Court. On December 16, 1982, Plaintiffs filed a Petition for Rehearing, which was denied on February 3, 1983.

B. Facts Material to a Consideration of the Questions Presented

Many essential facts were summarized and stipulated by the parties prior to trial. The following is one such stipulation:

"The following generally described list of programs and activities are those which are challenged by the Plaintiffs. As set forth in Paragraph 5 (of this stipulation) the parties have agreed that, if Seagram's support of any of the following programs and activities, individually or taken collectively, together with the surrounding facts and circumstances, is found by the highest court which addresses the merits of this action only, the fact of anti trust laws, for the purposes of this action only, the fact of injury and amount of

damage to the Plaintiffs shall be presumed. The parties are free to supplement each of the following descriptions with evidence introduced at trial and to adduce the facts and circumstances surrounding such programs and activities:

(1) Seagram supported certain price reductions made and discounts offered by Midwest to all retailers on specified brands.

(2) Seagram supported certain progressive quantity discounts offered by Midwest to all retailers on specified brands.

(3) Seagram supported certain progressive quantity discounts on specified brands offered by Midwest to all retailers up to specified quantity brackets and Seagram also supported higher discounts for larger quantity purchases offered by Midwest only to certain large-volume retailers.

(4) Seagram supported discounts on specified brands offered by Midwest *only to certain large-volume retailers in the amount of \$100 per case on all cases purchased during a 6-month period* if the retailer matched the number of cases he purchased in a "base" period consisting of the same 6-month period during the preceding year and an additional amount of \$1.00 per case for each case purchased during the 6-month period in excess thereof. (Emphasis supplied.)

(5) Seagram supported discounts on specified brands given by Midwest *only to two large volume retailers in the amount of \$1.00 or \$2.00 per case on all their purchases of specified brands*. (Emphasis supplied.)

(6) Seagram supported discounts on specified brands given by Midwest when Midwest reduced its discounts previously offered to all retailers on smaller container sizes (fifths and smaller) and increased its discounts offered on larger sizes (quarts and half-gallons).

(7) Seagram supported discounts on specified brands given by Midwest *when Midwest increased the difference between the quantity discounts it offered to all retailers*

on 25-case purchases and 100-case purchases. (Emphasis supplied.)

(8) Beginning in October, 1975, Seagram entered into an agreement with Midwest by which Seagram guaranteed Midwest a 10.5% gross profit or margin on 7 Crown and VO. Such guaranty was effected by crediting Midwest at the end of each 6-month period an amount sufficient to reduce Midwest's cost on 7 Crown and VO to the extent necessary to make Midwest's gross profit or margin equal to the agreed upon percentage when compared to Midwest's actual sales revenue realized during that period. The agreement has continued to date with the percentage increased to 11% and subsequently to 11.5%." (Stipulation and Agreed Order, Record Vol. p. 22.)

(There was no dispute that these activities had been initiated or continued during the four-year period prior to the filing of the Complaint.)

To flesh out this bare bones outline, the parties introduced evidence, both through witnesses and documents, during the trial.

This included the deposition of a Seagram official, Mel Elliott (hereafter "Depo."). Certain of the facts so developed are important to this Court's consideration of whether the Writ should be granted in this case:

Midwest was (and is) the sole source of supply of Seagram products in the Denver Metropolitan area (the relevant geographic market). (Tr., p. 143)

While Seagram did not always agree with Midwest's requests for support for discount programs, Midwest put specific discount programs into effect *only after* Seagram financial support *had been agreed upon*. That support varied with the amount of the discount offered by Midwest. These discounts were not based upon cost savings to either Seagram or Midwest (Depo. pp. 26, 32, 39, 41, Tr., p. 109-110, Exhibit 15).

Even after the initiation of the guaranteed profit program for Midwest, Seagram additionally funded *extra discounts of*

\$1.00 and \$2.00 per case for payment by Midwest to the two largest volume retailers in the Denver Area (Depo. pp. 47-48, 64-65, 91-92). This extra discount program was explained to these two retailers by representatives of Seagram and Midwest (Tr., p. 44-46, 50, 198-199).¹

Prior to the guaranteed profit program, Seagram had agreed to and did, fund similar additional discount programs for four of the largest retailers in the Denver Area. These were over and above those shown on the "deal sheets," and on which the largest available discounts were for 100-case deals (Tr., p. 167-169, Ex. 78).

At a meeting in Los Angeles, California, between representatives of Midwest and top officials of Seagram, the guaranteed profit program for Midwest was worked out for Midwest's sales of 7 Crown and VO (the two largest volume products) on the express agreement and understanding that Midwest would adjust its discounts to its customers to achieve a wholesale price of \$7.88 or \$7.90 per one-half gallon bottle of 7 Crown which was being offered to volume customers. The parties (Seagram and Midwest) expected that this would result in a \$7.99 retail price to be offered by such retail customers (Depo. 42-45, 51, 68; Tr., p. 76, 99, 111, 206, 248, 34-346).

In October 1975, following implementation of the Los Angeles agreement between Seagram and Midwest, the two specially favored retailers (Harry Hoffman and Applejack) began advertising 7 Crown half-gallons at \$7.99 on the very same date (Exhibit 102A). Since the *best* Midwest wholesale price to retailers *not receiving* the extra discount of \$1.00 or \$2.00 per case was a \$7.88 net cost per bottle, such retailers would have to accept a 1.4% gross margin of profit if the \$7.99 price offered by the favored retailers was met. This amount was far exceeded by the normal operating expense of a retail store (Tr., p. 270). Hoffman's 7 Crown half-gallon margin, on the other hand, was 5.8%, due to its extra discount, placing that large volume retailer at considerable competitive advantage, vis-a-vis other retailers.

¹The Trial Court found, "Seagrams provided Midwest financial assistant which enabled the perpetuation of both programs." (Appendix A p. 17)

From October of 1975 until at least the filing of this case in November, 1976, the largest size of 7 Crown was advertised at \$7.99 (Exhibit 102A). The retail price of VO was similarly *stabilized*. The net bottle cost on the 100-case deal was varied during the same time period between \$7.88 to \$8.42. Thus, at times, consumers could purchase at retail, from Harry Hoffman and Applejack, Seagram's 7 Crown at a *cheaper price* than the Plaintiffs could buy that product, *on the best deal available to them*, at Midwest (Tr., p. 213, 215, 216).

On July 31, 1976, Seagram started funding extra quantity discounts of 200, 300, 500 and over 500 case quantities. These discounts offered one and two extra dollars (\$1.00 and \$2.00) to about six "qualifying" retailers, including Harry Hoffman and Applejack. Seagram paid for these programs as a separate item from the "Guaranteed Profit Agreement." (Tr., p. 113, 114, 114, 117, 120, 121, 122, 208, 209, 212).

Losses in profits and sales were incurred by the Plaintiffs. Such losses were quantified by Stipulation of the Plaintiffs with Seagram. Seagram stipulated to fact of injury.

There was no dispute that the conduct between Seagram and its wholesaler was consensual. The wholesaler testified that *but for* Seagram's agreement to fund these discriminatory programs, it could not afford to offer them. No issue of coercion was raised by Defendants. Rather, at all times, Defendant stated that it freely entered into the agreements and that the agreements involved the wholesaler's price to its customers. It is not disputed that the Defendant Seagram could have unilaterally varied its price to Midwest. However, it varied its price only upon the express understanding that Midwest would also vary its price and/or transmit discriminatory discounts to the customers of Midwest.

ARGUMENT

A. RETAILERS WHO MUST BUY FROM A VERTICAL PRICE FIXING SCHEME IN ORDER TO OBTAIN THE PRODUCT FROM THE ONLY LEGALLY AVAILABLE SOURCE IN THE GEOGRAPHIC MARKET, NEED NOT ALLEGE OR PROVE THAT

COERCION WAS USED TO CREATE OR MAINTAIN THE CONTRACT, COMBINATION OR CONSPIRACY WHICH FIXED THE PRICES AT WHICH HE COULD PURCHASE THE PRODUCT.

The Tenth Circuit announced in its decision that coercion was the *sine qua non* of a vertical price fixing case, regardless of the fact that the Plaintiffs were not part of the contract, combination or conspiracy and regardless of the fact that the price fixing was the result of consensual conduct between the wholesaler and distiller:

The small retailers assert that the record establishes as a matter of law an agreement, combination or conspiracy affecting prices; they assert that once such an agreement is found, the cases holding vertical price maintenance agreements to be per se violations of the Sherman Act, rendering unnecessary any further inquiry except with regard to damages, which have been stipulated . . . "While we agree that resale price maintenance schemes are per se unlawful, all vertical arrangements affecting price do not constitute price maintenance agreements. The crux of any price fixing agreement is the relinquishment by a trader . . . of the freedom to set prices in accordance with his own judgement." . . . Although a supplier may suggest a resale price, . . . the supplier may not coerce the seller's adherence to that suggested price. . . . Here, no coercion was present . . . Requiring Midwest to pass on the price break granted by Seagram does not by itself constitute the coercion or pressure to maintain resale prices condemned in decisions finding per se violations.

(Appendix B p. 26)

If indeed, coercion is the *sine qua non* of a vertical price fixing case for those in the position of the Plaintiffs here, then they must agree that the Writ should not be granted on this issue.

The law, however, is to the contrary, creating a *conflict* among the circuits:

An unlawful resale price maintenance scheme can be effected in either of two ways: the manufacturer and its distributors may enter into an express or implied agreement to maintain a fixed resale price, *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 721, 64 S.Ct. 805, 812, 88 L.Ed. 1024 (1944), or the manufacturer may secure adherence to its suggested resale price through coercion, including threats to terminate distributors if they do not follow the suggested price. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 43, 80 S.Ct. 503, 511, 4 L.Ed.2d 505 (1960).

Spray-Rite Service Corporation v. Monsanto Company, 684 F.2d 1226, 1234 (7th Cir. 1982.)¹

Thus, there is a clear conflict here between the views of the Seventh and Tenth Circuit. That of the Seventh Circuit is supported by the great weight of authority, particularly the decision of this Court in *United States v. Bausch & Lomb Co.*, cited above by the Seventh Circuit, and ignored by the Tenth.

Counsel have been unable to find any decision of this Court which suggests a retreat from the position it expressed in *(Bausch and Lomb)*. The fact that a per se violation may be found in a vertical price fixing arrangement by agreement, rather than have coercion required as a necessary element of proof has been expressed by a leading commentator on the Anti Trust laws:

Conduct amounting to vertical price fixing or resale price maintenance, whether of minimum or maximum prices, is unlawful per se under both Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act . . . Thus, whether based on understandings express or implied, or on combinations inferred from the buyer's acquiescence in a coercively enforced price policy,

¹ *Certiorari* has been recently granted in *Spray-Rite*. No designated issue in *Spray-Rite* appears to contest the Seventh Circuit ruling that "coercion" is not required where a vertical consensual agreement, combination, or conspiracy is shown. (Cert. granted 2-28-83 Dkt. 82-914)

resale price maintenance, is regarded as a naked restraint of trade with no purpose other than the suppression of competition. . . . In the vertical context, unlawful price maintenance arrangements have been found where resale price control is pursued through (1) express arrangements; (2) use of affirmative conduct to enforce suggested prices; and, (3) use of otherwise permissible pricing practices to obtain adherence to suggested prices.

Von Kalinowski, *Anti Trust Laws and Trade Regulation*, Sec. 6B.02 (3), p.6B-32 - 6B-35.

This court should grant the Writ on this issue since the decision below represents an evisceration of the doctrine that resale price maintenance is a *per se* violation of the Sherman Act. This Court has steadfastly upheld that doctrine since its seminal decision in *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, 220 U.S. 373 (1911), and recently reaffirmed in *Continental TV, Inc., v. GTE, Sylvania, Inc.*, 433 U.S. 36, n 18 (1977).

As this Court said, in a case which involved this same defendant, an agreement to fix resale prices was illegal, *per se*, under Section 1 of the Sherman Act, *Kiefer-Stewart Co. V. Joseph E. Seagram & Sons*, 340 U.S. 211, 213, 71 S.Ct. 259, 260, 95 L.Ed. 219 (1951).

The Tenth Circuit decision below holds that, even though conduct may be consensual, *there must be a showing of coercion* as between the members of the contract, combination or conspiracy, even for plaintiffs who are victims rather than a part of the conspiracy.

While proof of coercion might have been required, if Midwest (the wholesaler), rather than one of its customers, had been the plaintiff (*see Canandian American Oil Co. v. Union Oil Co. of California*, 577 F2d 468, 471-472, (9th Cir. 1978), where, as here, the plaintiff is a customer of the vertical price fixing contract, combination or conspiracy, proof of coercion between the members thereof upon each other, is not an essential part of the plaintiff's cause of action. This well established proposition was totally ignored

by the Court below and, if allowed to stand, would seriously dilute, if not destroy, the impact of the recent decisions of this Court in *Blue Shield of Virginia v. McCready*, 457 U.S. _____, 102 S.Ct. 2540, 73 L.Ed. 2d 149, 50 U.S.L.W. 4723 (1982), and *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331-2333, 60 L.Ed. 2d 931 (1979), by adding proof of coercion to a requirement for standing on the part of the plaintiffs, in those genre of cases.

The stipulated facts in the case below are alone sufficient to establish the concert of activity aimed at the price structure for specific products by Seagram.

Even if the object of the agreements between Seagram and Midwest was merely to affect the prices at which certain products were to be advertised, this would be sufficient to establish a violation. *Schnapps Shop, Inc. v. H. W. Wright & Co. Ltd.*, 377 F.Supp. 570, 581-582 (D.Md. 1973).

Concerted activity within the scope of Section 1 of the Sherman Act occurs when one business entity takes action at the request of a second business entity to do an act denounced by the Act (see e.g. *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F2d 1317, 1322 (9th Cir. 1975), cert den. 423 U.S. 1053 (1976). This is what occurred in the instant matter according to the undisputed facts.

The plaintiffs suffered injury as a result of this tampering with the price structure. This has been stipulated as to both fact and amount. It was clearly anti trust injury. They were obviously injured in their business and property within the parameters set by this court in *Blue Shield of Virginia v. McCready*, *supra*, at 442 U.S. 337.

The Tenth Circuit's decision here under review would engraft the artificial limitations which this Court has consistently refused to impose by adding the requirement of proof of coercion between the joint tort feasers to plaintiffs' burden in vertical price fixing cases.

This must not receive even the limited *imprimatur* of "certiorari denied," but must instead, be struck down as egregious blunder in anti trust law enforcement.

B. A CONTRACT, COMBINATION OR CONSPIRACY BETWEEN A DISTILLER AND ITS ONLY WHOLESALER IN THE RELEVANT GEOGRAPHIC MARKET TO DISCRIMINATE IN PRICE, AS BETWEEN COMPETING RETAILERS, IS A FORM OF PRICE FIXING, A RESTRAINT OF TRADE, WHICH IS A *PER SE* VIOLATION OF SECTION 1 OF THE SHERMAN ACT.

A major vice of the decision below, and another reason why it cannot be allowed to stand and have precedential value, is that, it confuses a unilateral decision to discriminate with discrimination, which is the result of a contract, combination or conspiracy.

Just as one may unilaterally determine not to sell to a particular customer, *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), one may not enter in agreement with others to boycott such a customer without engaging in a *per se* violation of Section 1, *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 46 (1960) (1959). It matters not that the impetus for the discriminatory action stemmed from a request from others; the manufacturer remains liable for his participation in the scheme (see e.g. *United States v. General Motors Corp.*, 384 U.S. 127, 143 (1966). Indeed, in such cases "... we need not inquire into the economic motivation underlying their conduct." (Id. at 384 U.S. 146).

It would have been thought that by now discriminatory practices resulting from agreement of competitors or from agreement between independent merchants in a vertical relation, rather than from unilateral decision (which, in some instances, would fall afoul, of the Robinson-Patman Act), would be universally recognized as "... included among the restraints of trade which the Sherman Act condemns." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 930 (1947).

Indeed, this distinction between discrimination as the result of a unilateral decision and discrimination as the result of agreement appears to be well recognized outside the Tenth Circuit (e.g. *Rutledge v. Electric Hose and Rubber Co.*,

372 F.Supp. 1267, 1272 (CD Calif. 1971), *affd.* 511 F2d 668 (1975); *Ag-Chem Equipment Co., Inc. v. Hahn, Inc.*, 480 F2d 482, 492-493 (8th Cir. 1973).

The lower federal courts have recognized such agreements to discriminate in price as between competing customers to be a form of price fixing and a per se violation of Section 1 of the Sherman Act (e.g. *Banana Distributors, Inc. v. United Fruit Co.*, 162 F.Supp. 32, 35, 39 (SD NY 1958); *Admiral Theatre Corp. v. Paramount Film Distributing Corp.*, 140 F.Supp. 686, 696-697 (D Neb 1955); *K.S. Corp. v. Chemstrand Corp.*, 198 F.Supp. 310, 314 (SD NY 1961); *Peelers Co. v. Wendt*, 260 F.Supp. 193, 195, 197 (SD Wash 1966); *Lehmann Trading Corp. v. J & H Stalow, Inc.*, 184 F.Supp. 21 (SD NY 1960); *Laitham Corp. v. King Crab*, 244 F.Supp. 9 (D Alaska 1965). *See also Dart Drug Corp. v. Corning Glass Works*, 480 F.Supp. 1091, 1099-1102 (D Md 1979), which applied Section 2 to price discrimination).

While harm to the Plaintiffs standing alone may be insufficient, the rule is that Plaintiff must show, as they have done here, that they are being harmed while their competitors, who were served by the same supplier, are favored in violation of the anti trust laws. *Harlem River Consumer Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 371 F.Supp. 701, 711 (SD NY 1974), *affd.* mem 493 F2d 1352 (2d cir. 1974).

The small retailers who could not buy from Midwest at prices below, or in some cases even equal to, those offered by the favored retailers to the general public, have met this test.

Midwest, acting alone, would not have provided the extra discounts and rebates to the few favored retailers. They acted only when they had the support and agreement of Seagram, which knowingly provided additional discounts for a few favored retailers to depress the retail market price of certain of its products.

The contract, combination or conspiracy to discriminate in price has been established, indeed, admitted by Seagram.

Seagram was free to start or support a price war against its competitors, and could have legally done so even with a differentiated discount structure based upon cost savings and efficiencies granted to its wholesaler. Instead, here it chose to maintain its market position, at the expense of the small retailers, by agreeing with the wholesaler that the wholesaler grant specified discounts to the wholesaler's favored and specified customers, which were greater than those afforded the Plaintiffs.

This is a clear violation of the anti trust laws of the United States, and the decision below upholding such an agreement between two business entities to discriminate in prices offered to various retailer competition must not be allowed to stand.

CONCLUSION

The decision below attacks the fundamentals of anti trust law enforcement in its most sensitive area, price.

The decision below is of such a nature as not merely to justify the issuance of the Writ, but also deserves and should receive summary reversal by this Court.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS
March _____, 1983

APPENDIX A**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 77-W-1030

AAA LIQUORS, INC., a Colorado)	
ccorporation; A-1 DISCOUNT LIQUORS,)	
INC., a Colorado corporation; AL'S)	
LIQUOR STORE, INC., a Colorado)	
corporation; COLORADO LIQUORS,)	
INC., a Colorado corporation; CRAZY)	
FARMER LIQUOR, INC., a Colorado)	
corporation; DAYTON LIQUORS, INC., a)	
Colorado corporation; ARTHUR W.)	
STENCIL, d/b/a DICKERSON'S LIQUOR)	
ROBERT N. SHACKLETT, d/b/a)	
ELEVENTH AVENUE LIQUOR HOUSE;)	
LORENZ and RUTH FRIEND, d/b/a)	
FRIEND LIQUOR STORE; GLORIA)	
DiMANNA, d/b/a GENO'S LIQUORS;)	
IRVIN RUBIN, d/b/a JR LIQUORS;)	
JOHN DeCICCO, d/b/a KIPLING)	
LIQUORS; DEVON TALBERT, d/b/a)	
NORTHGLENN LIQUORS; ROBERT)	
McINTYRE, d/b/a OLD TOWN)	
LIQUORS;)	MEMO-
HERMAN and DELORES FLAX, d/b/a)	RANDUM
SKYLINE LIQUORS; SAM FIREMAN)	OPINION
and ARNO BRUCK, d/b/a TED'S)	AND ORDER
LIQUORS; and THORNTON CORK'N)	
BOTTLE, INC., a Colorado corporation,)	
<i>Plaintiffs,</i>)	
vs.)	
JOSEPH E. SEAGRAM AND SONS,)	
INC., d/b/a CALVERT DISTILLERS)	
COMPANY, BROWN VINTNERS)	
COMPANY, and SEAGRAM)	
DISTILLING COMPANY,)	
<i>Respondents.</i>)	

On November 11, 1977, plaintiffs, retailers of spiritous liquors duly licensed under the laws of the State of Colorado, filed a complaint which was amended on April 6, 1978, alleging the named defendants violated the anti-trust laws of the United States by contracting, combining or conspiring to restrain trade and by discriminating in price between competitors. At a pretrial conference on December 1, 1978, the court was informed that only one defendant, Joseph E. Seagrams & Sons, Inc., ("Seagrams") remained in the case. The trial to the court January 8, 1979 through January 11, 1979 disclosed evidence relevant to the Sherman Act §1, as amended, 15 U.S.C. §1 and the Robinson-Patman Act 2(a), 15 U.S.C. §13(a) accusations. Evaluation of the evidence, based upon the reasons set forth below, warrants a finding in favor of the defendant.

Seagrams a wholly-owned subsidiary of the Seagram Company Limited, distills, manufactures, imports and sells spiritous wines and liquors. Plaintiffs contend Seagrams' agreement and cooperation with Midwest Liquor and Wine Company ("Midwest"), an independent wholesaler, to provide financial support for various discount programs advancing Seagrams brands caused adverse effects and damage constituting violations of the anti-trust laws. Further they allege that Seagrams and Midwest agreed and conspired to develop and operate promotional pricing schemes which caused the advertised retail prices to be depressed and stabilized. consequently, plaintiffs claim price competition was virtually extinguished since only specific large retailers had the advantage of Midwest's discount programs, leaving many retailers unable to sell Seagrams brands without taking a loss. The quantum of damages and the fact of injury was stipulated to pretrial.

The promotional programs in issue involve Midwest's progressive quantity discounts, guaranteed profit margins and large quantity discounts with respect to Seagram's brands, V.O. and 7 Crown. V.O. is a six year old Canadian whiskey imported in the bottle at 86.8 proof. 7 Crown is an American blended whiskey. From 1973 through July 1975 four large Denver retailers, Applejack, Harry Hoffman, Argonaut and Payless were offered by Midwest a discount of \$1 per case of 7 Crown or V.O. sold if the retailer match-

ed its level of purchases for the prior corresponding period, with \$1 per case offered for any additional purchases. Seagrams then granted Midwest price reductions in support of this "escalator program." From October 1975-July 1976, Harry Hoffman and Applejack were targeted to encourage advertisement of Seagrams' brands whereby Hoffman received \$2 per case discount thereafter. A similar program for V.O. was offered with a 200 case minimum. Seagrams provided Midwest financial assistance which enabled the perpetuation of both programs. A decline of Seagrams' position in the market elicited another attempt to boost its sales whereby Seagrams guaranteed that Midwest would realize a 10 1/2 gross profit on its sales of the two products, giving Midwest flexibility of pricing while keeping V.O. and 7 Crown prices at a competitive level. These promotional plans, designed by Midwest in an attempt to achieve "total distribution" are the cause of the vertical price fixing attacks by plaintiffs.

Sherman Act Claim

A cause of action pursuant to §1 of the Sherman Act requires that the plaintiff prove (1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the object of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of the conspiracy. *Martin Dodge Co. v. Chrysler Corporation*, 570 F. 2d 72 (3rd Cir. 1977). Such a showing is absent here.

A *per se* violation of Section 1 of the Sherman Act can be found when vertical resale price maintenance agreements are operating. *Hanson v. Shell Oil*, 541 F. 2d 1352 (9th Cir.) cert. denied 429 U.S. 1074 (1972). "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific v. U.S.*, 356 U.S. 1 (1958).

Through §1 of the Sherman Act does not require direct evidence of a conspiracy, even a collation of the circumstances here does not permit finding a violation. *Delaney v. Bonne Bell*, 525 F. 2d 296 (10th Cir. 1975). The evidence does not reveal a desire or effort by Seagram to fix prices to be charged by the retailers. Midwest is the only liquor distributor in Denver. It handles 80% of Seagram's sales in this area which might give the deceitful impression of a conspiratorial relationship. However, interaction between Seagram and Midwest did not amount to the concerted action necessary to constitute a conspiracy.

Often an examination of price-fixing violations focuses on whether a supplier's price dictation has been substituted for the pricing judgment and freedom of a wholesaler or retailer. A price fixing violation exists when the wholesaler or retailer relinquishes this control. *Albrecht v. Herald*, 390 U.S. 145 (1968). The cases go further by explaining that vertical price-fixing is not established as long as the wholesaler remains free to determine his own prices, even when the supplier has suggested or even urged a similar pricing arrangement. *Hansen v. Shell Oil*, *supra*. *Chisholm Brothers v. International Harvester*, 398 F 2d 1137 (9th Cir.) cert. denied 419 U.S. 1023 (1974). More expansively, if wholesaler's discounts are a result of his own pricing judgements there is no price-fixing violation even though such discounts would not be feasible without support from the suppliers. *Sun Oil v. FTC*, 294 F. 2d 465 (5th Cir.) rev'd on other grounds, 371 U.S. 508 (1961).

In *Sun Oil v. FTC*, *Supra*, a vertical price fixing violation was not found where Sun granted an allowance to one dealer to help him lower his retail prices with the goal of meeting competition. The dealer received Sun's price support, as Midwest was assisted by Seagram's support, enabling them to charge the prices they deemed appropriate to remain competitive. The promotional pricing schemes developed and offered by Midwest to circulate Seagram's products resulted from Midwest's unimpeded independent research, analysis and motivation. Mr. Stutts, Colorado State manager for Seagrams, testified, "They (Midwest) have 30 people, including several management and I have two people. I rely on what they know." Mr. Freis, Midwest's sales

manager and later president, testified confirming this laissez-faire policy. Though Seagram financially assisted Midwest, Midwest maintained complete control over the distribution and decision making concerning Seagram's brands.

In the instant case, plaintiff has failed to demonstrate *per se* illegal price-fixing pursuant to §1 of the Sherman Act. there has been no showing that the alleged vertical restraints have or are likely to have a "pernicious effect" on competition or that they lack any "redeeming value." *Northern Pacific v. U.S. supra*. Therefore, there must be an evaluation as to whether the questionable acts endure rule-of-reason scrutiny to complete the Sherman Act analysis. *Standard Oil v. United States*, 221 U.S. 1 (1911.)

Practices which are potentially less harmful to competition than those worthy of *per se* categorization are to be judged by the rule-of-reason.

"Under the rule-of-reason analysis the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable, the history of the restraint, the evil believed to exist, the reason for adopting and particular remedy, the purpose or end sought to be attained, are all relevant facts."

Chicago Board v. U.S., 246 U.S. 231 (1918).

"The ultimate test of legality, is whether the particular restraint promotes or impairs competition. The intent or purpose underlying the restraint is a crucial variable in aiding the Court to assess the competitive effects of the restraint." *Glauser Dodge v. Chrysler*, 570 F. 2d 72 (3rd Cir. 1977). As fact-finder, I have weighed all of the circumstances in consideration of the challenged activities' impact on competitive

conditions. Upon institution of the promotional programs by Midwest, the sale of Seagrams' brands was stagnating, and their prices were above the competitive level as depicted in the testimony of Mr. Freis. (p. 248) Seagram's and Midwest's reaction to this situation actually lowered retail prices which increased the sales volume of many retailers, including three of the four plaintiffs that had representatives testify at trial. Seagrams' support of Midwest's programs particularly the profit guarantee, gave Midwest more flexibility allowing it to raise and lower its list prices.

Though rule-of-reason addresses conduct that is not manifestly anti-competitive, the fact that Seagrams merely subsidized the wholesaler does not rise to the level of detrimental impact necessary to constitute a §1 Sherman Act violation.

Robinson-Patman Act Claim

The Robinson-Patman Act, Section 2(a), 15 U.S.C. §13(a) does not warrant the imposition of liability upon Joseph E. Seagram & Sons, Inc.

To maintain an action under §2(a) the plaintiff must allege and prove (1) that the defendant is engaged in commerce, (2) in the course of such commerce the defendant has discriminated in price between different purchases of commodities of like grade and quality, (3) that either or any of the purchases involved in such discrimination are in commerce, and (4) that there is likely to be a severe adverse effect on competition. *Lehrman v. Gulf Oil*, 464 F. 2d 26 (5th Cir. 1973) cert. denied 409 U.S. 1077).

The plaintiffs seek recovery pursuant to the Robinson-Patman Act claiming Seagram and Sons is the seller of an "indirect purchaser." "If the manufacturer deals with a retailer through the intermediary of wholesalers, dealers or jobbers, the retailer may nevertheless be a 'purchaser' or the manufacturer." *American News v. F.T.C.*, 300 F.2d 104 (2d Cir.) cert. denied 371 U.S. 824 (1962). This contention is based upon Seagram's alleged control over the terms and conditions of sales to retailers by Midwest. This control would impose responsibility upon Seagram for the discrimination in sale price, if such discrimination exists. The

facts do not establish that Seagram directed Midwest's price determinations, nor do they disclose that Seagram actually participated in any sales to retailers. Rather Seagram and Midwest are independent links in the distribution chain.

The present action does not fall within the provisions of the Robinson-Patman Act since none of the sales alleged to be discriminatory actually transpired in interstate commerce. Seagrams sales to Midwest f.o.b. the distillery or point of importation into the United States. 7 Crown's f.o.b. point is Lawrenceburg, Indiana, and V.O.'s point is Detroit, Michigan. All retail purchases were totally consummated in Colorado, all purchases from Midwest were accommodated by its inventory situated here.

The Tenth Circuit has strictly applied the statutory requirement that "either or any of the purchases involved in such discrimination are in commerce." *McGoffin v. Sun Oil*, 539 F. 2d 1245 (10th Cir. 1976). In the absence of any purchases crossing state lines there is no substance to the Robinson-Patman claim in the immediate case. *Gulf Oil v. Copp Paving*, 419 U.S. 186 (1974).

Seagram's products have dominated the market for years and its distributor clearly controls liquor distribution in Denver, making Seagram's operation vulnerable to anti-trust attacks. The record doesn't reveal sufficient evidence to show that the effect of Midwest's promotion programs was substantially adverse to the competitive environment, Midwest price determinations hereby allowed Seagrams' brands to be sold at competitive levels. Seagrams did not act in furtherance of anti-competitive objectives, therefore, are not in violation of §of the Sherman Act or §2(a) of the Robinson-Patman Act.

IT IS THEREFORE ORDERED that judgement shall enter in favor of the defendant and against the plaintiffs and the defendant is awarded its costs.

Dated this 22nd day of December, 1980.

S/Fred M. Winner
United States District Judge

APPENDIX B**PUBLISH****UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

AAA LIQUORS, INC., a Colorado)
 corporation; A-1 DISCOUNT LIQUORS,)
 INC., a Colorado corporation; AL'S)
 LIQUOR STORE, INC., a Colorado)
 corporation; COLORADO LIQUORS,)
 INC., a Colorado corporation; CRAZY)
 FARMER LIQUOR, INC., a Colorado)
 corporation; DAYTON LIQUORS, INC., a)
 Colorado corporation; ARTHUR W.)
 STENCIL, d/b/a DICKERSON'S LIQUOR)
 ROBERT N. SHACKLETT, d/b/a)
 ELEVENTH AVENUE LIQUOR HOUSE;)
 LORENZ and RUTH FRIEND, d/b/a)
 FRIEND LIQUOR STORE; GLORIA)
 DiMANNA, d/b/a GENO'S LIQUORS;)
 IRVIN RUBIN, d/b/a JR LIQUORS;)
 JOHN DeCICCO, d/b/a KIPLING)
 LIQUORS; DEVON TALBERT, d/b/a)
 NORTHGLENN LIQUORS; ROBERT)
 McINTYRE, d/b/a OLD TOWN)
 LIQUORS;) No. 81-1061
 HERMAN and DELORES FLAX, d/b/a)
 SKYLINE LIQUORS; SAM FIREMAN)
 and ARNO BRUCK, d/b/a TED'S)
 LIQUORS; and THORNTON CORK'N)
 BOTTLE, INC., a Colorado corporation,)
Plaintiffs-Appellants,)
 vs.)
 JOSEPH E. SEAGRAM AND SONS,)
 INC., d/b/a CALVERT DISTILLERS)
 COMPANY, BROWN VINTNERS)
 COMPANY, and SEAGRAM)
 DISTILLING COMPANY,)
Defendants-Appellees.)

*Appeal from the United States District Court
 For the District of Colorado
 (D. C. No. Civil 77-W-1030)*

James C. Bull of Quiat, Bucholtz, Bull & Laff, (Irvin M. Kent with him on the brief) Denver, Colorado, for Plaintiffs-Appellants.

Macdonald Flinn (Allan Gropper, also of White & Case, New York, New York; and H. Thomas Coghill and David J. Richman of Coghill & Goodspeed, Denver, Colorado, with him on the brief) for Defendants-Appellees.

Before HOLLOWAY, MCKAY and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

Nineteen Denver liquor stores ("small retailers") appeal the trial court's holding that funding by Joseph E. Seagram & Sons, Inc. ("Seagram") of price discounts its Denver wholesaler, Midwest Liquor Co. ("Midwest"), offered only to a few large volume Denver liquor stores was not a "contract, combination, or conspiracy in restraint of trade" prohibited by section one of the Sherman Act, 15 U.S.C. §1. The small retailers contend that Seagram's funding constituted a *per se* violation of the antitrust laws because it amounted to vertical price fixing in that (1) Seagram knew Midwest gave the discounts only to the large volume stores, (2) as a condition to funding Midwest's discount program, Seagram required Midwest to resell to the large volume stores at a given price; and (3) Seagram had agreed to fund Midwest's price discounts for the purpose of, and with the result of, affecting retail prices charged by those large volume stores.

The trial court found that Midwest had initiated the discount program so that the large volume retailers would sell Seagram's liquor at a price competitive with what they charged for competing brands such as Jim Beam and Ancient Age. The trial court held that Seagram had not violated section one because the "interaction between Seagram and Midwest did not amount to the concerted action necessary to constitute a conspiracy." It found that the discount program "resulted from Midwest's unimpeded independent research, analysis and motivation"; further, that "Midwest maintained complete control over the distribution and deci-

sionmaking concerning Seagrams' brands." On appeal the small retailers argue that the trial court erred in not holding that Seagram committed a *per se* violation of the antitrust laws by engaging in vertical price fixing.

Many of the essential facts were stipulated and the others were largely undisputed. In the Denver area Seagram's most popular product is Seagram's 7 Crown, a moderately-priced blended whiskey competing principally with Jim Beam, Ancient Age, and Canadian Mist; Seagram's next most popular product is Seagram's V.O., a premium-priced Canadian blended whiskey competing principally with Canadian Club. Midwest, an independent liquor wholesaler, is the exclusive distributor for Seagram's products in the Denver area. Midwest does not sell those competing brands.

Discounts and special sales promotions are common merchandising techniques used by liquor wholesalers. The trial court found that Midwest, not Seagram, developed the challenged discounts and offered them to certain large volume liquor stores with the goal of increasing the market shares of 7 Crown and V.O. in Denver.¹ Midwest then asked Seagram to reimburse Midwest the costs of the discounts, and Seagram agreed.²

At the time the discount programs went into effect, 7 Crown was selling in the large volume stores for over \$9.00 per half gallon, and was losing ground to Jim Beam, Ancient Age, and Canadian Mist, which usually were selling for \$8.18 per half gallon. The large volume stores were rarely advertising 7 Crown, but were heavily advertising the competing brands, often featuring them as loss leaders. During the discount program the large volume stores did advertise 7 Crown for as little as \$7.99 per half gallon and significantly increased the amount sold.

¹ Midwest routinely offered certain discounts and promotions to all retailers. Midwest did not always ask Seagram to fund these programs; even when asked, Seagram sometimes declined to fund a program or provided only partial funding.

² In general, Seagram directly reimbursed Midwest the cost of the discounts. During one phase of the discount program, however, Seagram simply ensured Midwest a 10-1/2% gross profit on sales of 7 Crown and V.O., which exceeded Midwest's prior profit figures and allowed it to offer substantial discounts.

The small retailers contend that Seagram's requirement that Midwest pass the discount through only to the large retailers, had the effect of fixing the prices Midwest charged to the large retailers, who received the discount, and to the small retailers, who did not. Furthermore, they contend that the large retailers' prices also were fixed, to the detriment of the small retailers. If Seagram fixed the prices the wholesaler could charge all of the retailers, or if Seagram entered into an agreement, combination, or conspiracy to give a competitive edge to the large volume retailers, the small volume retailers have standing to sue.³

On appeal we have to consider only whether the record supports the trial judge's determination that section one of the Sherman Act was not violated under the facts of the instant case.⁴ The district court found that Seagram did not attempt to fix prices charged by either Midwest or the retailers. It found that although Seagram assisted Midwest financially, the wholesaler maintained complete control over the distribution and decisionmaking concerning Seagram's products.

The small retailers assert that the record establishes as a matter of law an agreement, combination, or conspiracy affecting prices; they assert that once such an agreement is found the cases holding vertical price maintenance agreements to be *per se* violations of the Sherman Act render unnecessary any further inquiry except with regard to damages, which have been stipulated. See *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-03 (1980); *Continental T.V., Inc. v. GTE*

³ The small retailers could have incurred damages of loss of profits or competitive disadvantage because they did not receive prices as low as the favored retailers. The parties stipulated to the amount of damages for which Seagram would be liable "if Seagram's support of any of [Midwest's discount programs] is found by the highest court which addresses the merits of the matter to violate the antitrust laws."

⁴ The small retailers initially charged Seagram with violating the Robinson-Patman Act, 15 U.S.C. § 13, asserting they were purchasers from Seagram within the meaning of the Act. The trial court ruled against the claim, finding that Seagram did not direct Midwest's price determinations or participate in any sales to retailers, that none of the allegedly discriminatory sales actually transpired "in interstate commerce," and that the promotion programs were not substantially adverse to the competitive environment. The small retailers did not appeal this holding; consequently, we express no opinion on its soundness.

Sylvania Inc., 433 U.S. 36, 51 n.18 (1977); *Albrecht v. Herald Co.*, 390 U.S. 145, 153 (1968); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 405-09 (1911). While we agree that resale price maintenance agreements are *per se* unlawful, all vertical arrangements affecting price do not constitute resale price maintenance agreements. "The crux of any price fixing agreement is the relinquishment by a trader . . . of the freedom to set prices in accordance with his own judgement." *Chisholm Brothers Farm Equipment Co. v. International Harvester Co.*, 498 F.2d 1137, 1142 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974). Although a supplier may suggest a resale price, *see, e.g., United States v. Parke, Davis & Co.*, 362 U.S. 29, 43-45 (1950), the supplier may not coerce the seller's adherence to that suggested price, *see, e.g., Simpson v. Union Oil Co.*, 377 U.S. 13, 17 (1954); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 52-55 (2d Cir. 1980); *Santa Clara Valley Distributing Co. v. Pabst Brewing Co.*, 556 F.2d 942 945 (9th Cir. 1977); *cf. Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 605 (1953) (tying arrangements condemned because they "coerce[] . . . abdication of buyers' independent judgment").

Here, no coercion was present. The small retailers do not contest the trial court's finding that Midwest initiated the discount program and voluntarily sought Seagram's financial support. They attack the court's finding that Midwest retained independent pricing judgment by pointing out that Seagram required the discounts given to Midwest to be passed through to the retailers. The small retailers rely upon *Pearl Brewing Co. v. Anheuser-Busch, Inc.*, 339 F.Supp. 945 (S.D. Tex. 1972), a case quite similar to that before us, which held that conditioning a price reduction on an agreement by the recipient to reduce its price imposes restrictions on the recipient a freedom of decision, and thus constitutes unlawful price fixing. In *Pearl Brewing*, the court declared that the testimony of the individual wholesalers supported a conclusion that the brewer predetermined the wholesaler's exact price to the retailer and the retailer's exact price to the public, 339 F.Supp. at 957-58, a conclusion the trial judge did not make in the case before us. Furthermore, we do not agree with the conclusion in *Pearl Brewing*. A supplier who grants discounts to a retailer to permit the retailer to charge competitive prices

has a legitimate interest in making sure the retailer receiving the discount "is not pocketing the price support instead of passing it on to consumers." *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 40 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972); *cf. Sun Oil Co. v. FTC*, 294 F.2d 465, 483-84 (5th Cir. 1961) (suggesting that supplier may be in violation of price discrimination proscriptions if it grants price support to a retailer who does not lower its prices correspondingly), *rev'd on other grounds*, 371 U.S. 404 (1963).

We see no meaningful distinction between the instant situation and one in which during a gasoline price war a wholesaler seeks support from its supplier, who gives such support conditioned upon the wholesaler passing it on to the retailer who is seeking to meet competition. *Cf. Butera v. Sun Oil Co.*, 496 F.2d 434 (1st Cir. 1974) (holding that discounts suppliers give retail outlets to permit them to meet local competition are not resale price maintenance agreements, because the retailers are free to select the price at which they sell); *Sun Oil Co. v. Vickers Refining Co.*, 414 F.2d 383 (8th Cir. 1969) (allowing a formula that geared the supplier's price to competitive changes in the resale price level); *Sun Oil Co. v. FTC*, 294 F.2d 465; *Swettlen v. Wagoner Gas & Oil, Inc.*, 373 F.Supp. 1022 (W.D. Pa. 1974), *aff'd mem.*, 511 F.2d 1395 (3d Cir. 1975).

Requiring Midwest to pass on the price break granted by Seagram does not by itself constitute the coercion or pressure to maintain resale prices condemned in the decisions finding *per se* violations. Such a requirement does not prohibit the wholesaler from making greater reductions in price than the discount provides. Nor does it force the wholesaler to accept the price break at all. Seagram's guarantee of the gross margin of the wholesaler at 10-1/28 did not amount to control of Midwest's wholesale prices or its distribution. Presumably Midwest is interested in maximizing profits, and would not offer a discounted price to a retailer unless it expected an increase in volume sufficient to offset the loss it would incur from lowering the price; presumably Midwest would discontinue the discount if increased volume were not realized. The record supports the trial court's conclusion that Midwest retained control over its prices and over the distribution of Seagram's brands.

While Seagram undoubtedly expected that reduction in

price by Midwest would allow large volume retailers to advertise a retail price sufficiently low to increase Seagram's market penetration, the record supports the conclusion Seagram did not fix retail prices. The retailers maintained control over their own prices; even though they were offered incentives to encourage price cutting, they were not coerced into offering a particular price or punished if they did not. *Cf. Lehrman v. Gulf Oil Corp.*, 464 F.2d at 40 (supplier may not bar recipient of price support from lowering price beyond amount of support); *Butera v. Sun Oil Co.*, 496 F.2d at 437 ("a meaningful event [must] depend upon compliance or non-compliance with [supplier's] 'suggested' or stated price").

The small retailers allege that even if the discount program did not impermissibly restrain the prices Midwest and the large volume retailers charged, the program was a *per se* violation of the Sherman Act because it was "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 223 (1940). However, the *Socony-Vacuum* statement arose in the context of a horizontal conspiracy; it should not apply to vertical arrangements of the type involved in the instant case. L. Sullivan, *Handbook of the Law of Antitrust* §141 (1977). See, e.g., *Butera v. Sun Oil Co.*, 496 F.2d 434 (1st Cir. 1974) (frequent price changes by supplier in response to market conditions does not constitute resale price maintenance even though retailers, who sell at low profit margins, immediately adjust their prices accordingly). Manufacturers' price changes have the natural effect of raising or depressing the retail price, and long term contracts between manufacturers and wholesalers have the effect of stabilizing retail prices. They should not be deemed unlawful price fixing arrangements.

Not only should we permit a supplier to lower its prices to help a retailer meet competition, but we should permit the supplier to start a price war. A retailer who believes its prices are not competitive must be allowed to ask the wholesaler or manufacturer to lower its prices so that the retailer can offer competitive prices. *Cf. Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 40 (5th Cir.) (supplier may grant price support to dealer who claims it needs support to match com-

petitors' prices, as long as the supplier does not forbid dealer's lowering prices beyond amount of price support), *cert. denied*, 409 U.S. 1077 (1972). We do not think section one of the Sherman Act requires the manufacturer to offer the same price to all its customers or even to all in a particular geographic area.⁵ If it were required to do so it would be inhibited from either starting or responding to a local price war. Such a holding would discourage competition rather than encourage it, contrary to the policy of the Sherman Act.

The trial court properly tested the alleged restraints under a rule-of-reason analysis, which requires scrutiny of the intent and effect of the restrictions. Seagram supported a pricing program whereby its wholesaler discriminated in pricing Seagram's liquors among different retailers in the Denver market. But there is no evidence that this was aimed at crippling the small retailers as competitors to the large volume liquor stores who received the lower wholesale prices. Rather, it is clear that the purpose of the discount program was to increase sales of Seagram's products vis-a-vis the major competing brands. While the parties stipulated to the fact and amount of damages, it is unclear whether those damages represent profits the small retailers could have made had they received the lower prices given to the favored retailers, or whether the damages represent a decline in sales volume due to a diversion of customers to the favored retailers. The court noted that three of the four small retailers who testified increased sales volume during the discount pricing period. The record establishes that the discount program had the effect of lowering retail prices to consumers and increasing interbrand competition. The ultimate test of legality, under the rule-of-reason analysis, is whether the particular restraint increases or impairs competition. *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 82 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). We agree with the trial court that Seagram's support of Midwest's discount program was not manifestly anti-competitive. The trial court's holding that there was no section one Sherman Act violation is **AFFIRMED**.

⁵The Robinson-Patman Act may prohibit price discrimination among customers if the Act's requirements are satisfied. But that Act also permits the defenses of meeting competition, 15 U.S.C. §13(b), cost-differential, and changing market, 15 U.S.C. §13(a). The existence of these defenses shows that Congress considered price discrimination to be reasonable in at least these circumstances.

APPENDIX C

JANUARY TERM - February 10, 1983

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges

AAA LIQUORS, INC., a Colorado)	
corporation, et al.,)	
Plaintiffs-Appellants,)	
v.)	No. 81-1061
SEAGRAM AND SONES, INC., d/b/a)	
CALVERT DISTILLING COMPANY,)	
BROWN VINTNERS COMPANY, and)	
SEAGRAMS DISTILLING COMPANY,)	
Defendants-Appellees)	

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Howard K. Phillips
HOWARD K. PHILLIPS, CLERK

APR 11 1983

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

October Term, 1982

AAA LIQUORS, INC., *et al.*,

Petitioners,

v.

JOSEPH E. SEAGRAM & SONS, INC.,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
TENTH CIRCUIT**

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Question Presented

Is there any basis for granting review where both the district court and the court of appeals (1) found as a matter of fact that a wholesaler independently conceived the quantity discount or other discriminatory allowances favoring large volume retailers challenged by the small retailer-petitioners and (2) concluded as a matter of law that it was not vertical price-fixing in *per se* violation of §1 of the Sherman Act for the wholesaler's supplier to agree to reduce its prices to support such resale price discounts even though (a) the wholesaler could not otherwise afford to grant them and (b) it was understood that the wholesaler would use at least the amount of the saving realized from the supplier's price reduction to discount its resale prices?

Designation of Parties

The petitioners are identified in the caption appearing on the cover and at page one of the petition. The respondent's correct name is Joseph E. Seagram & Sons, Inc. It is the wholly owned subsidiary of The Seagram Company Ltd. and its only subsidiary not wholly owned or affiliate is G. H. Mumm & Cie.

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No. 82-1512

IN THE
Supreme Court of the United States
October Term, 1982

AAA LIQUORS, INC., *et al.*, *Petitioners,*
v.
JOSEPH E. SEAGRAM & SONS, INC., *Respondent.*

**BRIEF IN OPPOSITION TO PETITION FOR
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
TENTH CIRCUIT**

Opinions Below

The opinion of the court of appeals is unofficially reported at 1982-83 Trade Cases ¶65,075 and is printed as Appendix B to the petition. The opinion of the district court is not reported but is printed as Appendix A to the petition.

Statement of the Case

In this private treble damage antitrust case, tried without a jury, the petitioners, liquor retailers in the Denver, Colorado area, alleged vertical price-fixing in *per se* violation of Section 1 of the Sherman Act (15 U.S.C. §1). Their claims that the Seagram Distillers Company ("Seagram"), a sales division of the respondent, Joseph E. Seagram & Sons, Inc., conspired with Midwest Liquor and Wine Company ("Midwest"), the only wholesaler of Seagram products in the Denver metropolitan area, to fix resale prices and to discriminate in price between petitioners and certain large volume Denver retailers were rejected by both the trial court and court of appeals.

Denver is a volatile, highly competitive area. Discounts and special sales promotions are common merchandising techniques used by liquor wholesalers. All of the wholesalers, not just Midwest, constantly promote their competing brands with periodic programs (both discount and non-price programs) designed to advance or regain sales volume and market penetration. Discounts offered by the wholesalers typically vary with the quantity purchased by the retailer.

During the period covered by the evidence, Midwest established a variety of price discount programs for Seagram's "7 Crown" and "V.O." brands. The Midwest programs involved progressive quantity discounts and, in some instances, the largest discount was available only on quantities purchased by just a few large retailers. In addition, extra inducements of one or two dollars a case were offered

at different times only to several of the large Denver stores which engaged in weekend "loss leader" price advertising, featuring a few selected leading brands. Typically such advertising was confined to half-gallon sizes and offered the brands selected by the retailer at a special price, good only for the weekend, just a few pennies above the store's "laid-in cost" (i.e., the price paid to the wholesaler, without any allocation of the operating or other costs incurred to run the store).

Midwest's programs were responsive to stagnating sales and declining market position experienced by "7 Crown" and "V.O." In addition, the Seagram brands were no longer featured regularly in the weekend "loss leader" advertising of the large retailers. Instead, the large stores continuously gave prominent space to the several brands of other suppliers which were most directly competitive with the Seagram brands. Those competing brands were advertised at prices more than a dollar below the prices at which the Seagram brands were placed on the store shelves without advertising.

In connection with the discount programs challenged by petitioners, with but one exception Midwest sought and obtained Seagram's agreement to reduce Seagram's price to Midwest by means of discounts or "depletion allowances" to be credited to Midwest for each case sold or "depleted" by Midwest pursuant to the specific terms of the program Midwest wanted to implement. It was understood between Seagram and Midwest that at least the full amount of each Seagram price reduction was to be used for the Midwest discount programs (in other words, Seagram's support was implicitly conditioned upon its being passed

on to Midwest's retailer customers, but Midwest was free to cover the cost of any part of its discounts not defrayed by Seagram's contribution). Without Seagram's support to offset, in whole or in part, the cost to Midwest of carrying out its programs, Midwest could not have afforded to offer the discounts it did.

The one exception to the pattern of support agreements outlined above occurred in 1975. In response to Midwest's view that "7 Crown" was losing sales and market position because it was not competitively priced, Seagram proposed a gross profit or margin guaranty to help Midwest bear the cost of reducing its resale prices. Regardless of what particular discount program or programs Midwest might adopt, Seagram agreed, across the board, simply to guarantee Midwest a gross profit or margin of 10.5 percent on the understanding that Midwest would attempt to make "7 Crown" more competitive by adjusting its resale prices as Midwest saw fit.

The dispositive fact defeating any claim of vertical price-fixing in *per se* violation of the Sherman Act was the finding by both courts below that Midwest had always maintained complete control over its resale pricing of Seagram's brands and had independently determined its own promotional pricing and discount programs even though it needed, sought and received financial support from Seagram to help defray the cost of such price reductions.¹ As the court of appeals concluded,

1. All of Midwest's list prices, discounts, discount levels and promotional programs for Seagram brands were established solely by Midwest based upon competitive conditions and its costs of doing business. Midwest personnel made all decisions in respect to its wholesale pricing and discount programs, including what programs would be run, when they would start, and when they would stop.

(footnote continued on next page)

“ . . . The trial court found that Midwest, not Seagram, developed the challenged discounts and offered them to certain large volume liquor stores with the goal of increasing the market shares of 7 Crown and V.O. in Denver. [footnote omitted] Midwest then asked Seagram to reimburse Midwest the costs of the discounts, and Seagram agreed.

* * *

“ . . . [The district court] found that although Seagram assisted Midwest financially, the wholesaler maintained complete control over the distribution and decision making concerning Seagram's products.

* * *

“ . . . The record supports the trial court's conclusion that Midwest retained control over its prices and over the distribution of Seagram's brands.” (Pet. 24, 25, 27²)

Midwest did not need Seagram's authorization to run any particular program. Solely for the purpose of determining whether Seagram would agree to support the cost of such programs by reducing its prices to Midwest and, if so, in what amounts, Midwest presented to Seagram the program it had unilaterally determined to be competitively necessary. Seagram neither suggested, influenced or dictated what the amount or type of Midwest's discounts would be nor was it asked for approval of or agreement to those elements of the program conceived by Midwest.

2. Reference is to the pages of the petition.

Reasons for Denying the Writ

I

The Decision of the Court of Appeals That There Was No Vertical Price-Fixing in *Per Se* Violation of the Sherman Act Correctly Follows the Teachings of This Court and Is Not in Conflict With the Decisions of Any Other Court of Appeals.

A. The Cases Uniformly Hold That Because Midwest Independently Conceived Its Own Discount Programs and Retained Control of Its Resale Pricing, Seagram's Price Support Was Not Price-Fixing.

Both courts below recognized that under the decisions of this Court vertical price-fixing is a *per se* violation of the antitrust laws. Both of the lower courts also understood, however, that in all claims of vertical price-fixing—including those, unlike the case at bar, where the supplier has suggested, urged, persuaded or even argued as to the resale price he thinks best—the test is simply whether the wholesaler has been either induced to surrender voluntarily or coercively deprived of his right to exercise his own pricing judgment and set his own price as he ultimately sees fit.³

As the trial judge held, “vertical price-fixing is not established as long as the wholesaler remains free to determine his own prices, even when the supplier has suggested or even urged a similar pricing arrangement.”

3. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *United States v. Bausch & Lomb Co.*, 321 U.S. 707 (1944); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

(Pet. 18) The court of appeals correctly stated and applied the controlling principle:

“... While we agree that resale price maintenance agreements are *per se* unlawful, all vertical arrangements affecting price do not constitute resale price maintenance agreements. ‘The crux of any price fixing agreement is the relinquishment by a trader . . . of the freedom to set prices in accordance with his own judgment.’ ” (Pet. 26)

The decisions of the courts of appeals uniformly articulate this same prerequisite to any finding of vertical price-fixing.⁴ On the unequivocal record showing that Midwest independently conceived and determined its own resale prices and discounts without even a suggestion by Seagram,⁵ therefore, the only tenable conclusion was that there had been no vertical price-fixing.

Both courts below also correctly rejected the contentions echoed here in the petition that Seagram was nevertheless guilty of vertical price-fixing because it was understood that Midwest was to reduce its prices by at least the amount of any support resulting from Seagram’s agreement to reduce its prices⁶ and because Midwest could not

4. See, e.g., *Chisholm Brothers Farm Equipment Co. v. International Harvester Co.*, 498 F.2d 1137, 1142 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974); *Checker Motors Corp. v. Chrysler Corp.*, 405 F.2d 319, 323 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969); *Adolph Coors Company v. FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974); *Gray v. Shell Oil Co.*, 469 F.2d 742, 747-48 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973).

5. On this determinative factual finding, even apart from the two-court rule applicable here, as the court of appeals noted, petitioners did “not contest the trial court’s finding that Midwest initiated the discount program and voluntarily sought Seagram’s financial support.” (Pet. 26)

6. As noted, however, Midwest was free to offer even larger discounts by absorbing the additional cost itself.

have afforded to bear the cost of the discounts it had determined were competitively necessary. Based as it is upon the fact that the discounted prices Seagram supported were those Midwest had independently decided it wanted to offer, this determination, too, is neither in conflict with the decisions of any other court of appeals nor contrary to any principles established by this Court.

It has been uniformly recognized that a supplier has the right to set his own price for the purpose and with the effect of influencing resale prices (including the price paid by the ultimate user or customer) even though the supplier's price decision patently affects the choice of resale prices available to his middlemen. Applying that principle to the facts of this case, a supplier may reduce his price for the purpose of enabling his dealers or distributors to market his product in more effective competition with the products of other suppliers as long as he does not dictate or require a specific resale price (or floor or ceiling) not of their free choice to which they must adhere.⁷

The cases also establish that a supplier's agreement to reduce his price, (1) even when conditioned upon the full amount of the saving thus realized by his dealer or distributor being passed on through corresponding decreases in their resale prices and (2) even though they could not otherwise bear the cost of such reductions, is not vertical

7. See, e.g., *Butera v. Sun Oil Co., Inc.*, 496 F.2d 434, 438 (1st Cir. 1974); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666 (D.C. Cir. 1977); *Checker Motors Corp. v. Chrysler Corp.*, 405 F.2d 319 (2d Cir.), cert. denied, 394 U.S. 999 (1969); *Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440, 446 (3d Cir.), cert. denied, 439 U.S. 866 (1978); *Overseas Motors, Inc. v. Import Motors Limited, Inc.*, 375 F. Supp. 499, 539 (E.D. Mich. 1974), aff'd, 519 F.2d 119 (6th Cir.), cert. denied, 423 U.S. 987 (1975).

price-fixing and does not violate the Sherman Act as long as the resulting resale price is what the middleman chooses to charge in exercising his freedom to determine his own price.⁸

Attempting to create a conflict with the recent decision of the Seventh Circuit in *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), petitioners urge that here the court of appeals held that coercion is the *sine qua non* of vertical price-fixing. The court of appeals did not so hold. Even a quick reading of its decision demonstrates at every turn that the court was fully aware that the challenged arrangements between Seagram and Midwest were wholly volitional and that no coercion had been imposed.

In correctly stating the principle which controls this case ("The crux of any price-fixing agreement is the relinquishment by a trader . . . of the freedom to set prices in accordance with his own judgment"—Pet. 26), the court of appeals clearly recognized that if, contrary to the evidence,

8. See, e.g., *Sun Oil Co. v. FTC*, 294 F.2d 465 (5th Cir. 1961), *rev'd on other grounds*, 371 U.S. 505 (1963); *Sun Oil Co. v. Vickers Refining Co.*, 414 F.2d 383 (8th Cir. 1969); *Swettlen v. Wagoner Gas and Oil, Inc.*, 373 F. Supp. 1022 (W.D. Pa. 1974), *aff'd without opinion*, 511 F.2d 1395 (3d Cir. 1975); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972). In *Lehrman*, Judge Wisdom stated:

"The supplier has a legitimate interest in satisfying himself that . . . retailers of the supplier's own product are charging no more than the price they have represented as being competitively necessary and as requiring wholesale price support. . . . [The supplier] must ascertain the price actually charged by his own retailer after support is granted to insure that the dealer is not pocketing the price support instead of passing it on to consumers through lower retail prices which presumably would mean more effective retail price competition and increased demand reflected at the wholesale level." (*Id.* at 40) (Court's emphasis)

Midwest had relinquished its pricing judgment to Seagram by purely volitional, uncoerced agreement a *per se* violation would have occurred. The court dealt with the question of coercion only to the extent that it found Seagram's conduct to be free of any coercive overtones. Thus, based upon its agreement with the findings that Midwest had independently conceived its discount programs and retained control over its own prices, the court of appeals simply noted that in those circumstances "requiring Midwest to pass on the price break granted by Seagram does not by itself constitute the coercion or pressure to maintain resale prices condemned in the decisions finding *per se* violations." As the court stated, Midwest remained free to make even "greater reductions in price." (Pet. 27)

B. Because There Was No Vertical Price-Fixing, Any "Conspiracy to Discriminate" Between Midwest and Seagram Could Not Be a *Per Se* Violation of the Sherman Act.

This case was tried pursuant to a stipulation that petitioners were urging only *per se* violations of §1 of the Sherman Act. Before both courts below and again here, petitioners argue that a "conspiracy to discriminate"—an agreement between a wholesaler and supplier to discriminate in price or the result of which is price discrimination among customers of the wholesaler—is another form of vertical price-fixing and, therefore, a *per se* violation of §1.

Petitioners' "conspiracy to discriminate" claims do not meet the test for finding a *per se* price-fixing violation. The evidence and findings below defeat any contention that the prices at which Midwest resold the Seagram brands, whether or not discriminatory, constituted vertical price-

fixing within the meaning so clearly defined by the cases. Because there is no valid basis for treating Seagram's support of Midwest's independently conceived discount programs as vertical price-fixing, there is no predicate for treating those arrangements as *per se* violations of §1.

As this Court's decision in *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), makes clear, vertical restriction agreements or arrangements other than resale price-fixing are to be evaluated by the rule-of-reason standard. Indeed, even under the Robinson-Patman Act, discriminatory prices are not a *per se* offense, and it is recognized that at least some price discrimination is pro-competitive or neutral in its effect. To make price discrimination (whether unilateral or by concerted action) unlawful, even the liberal standards of that much-criticized "incipiency" statute require proof that the discrimination probably will lessen competition substantially or tend to create a monopoly.

Contrary to petitioners' argument (Pet. 12), this Court did not determine in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), that "discriminatory practices resulting from agreement . . . between independent merchants in a vertical relation" are *per se* violations, price-fixing or otherwise. In *Paramount*, the Court affirmed a finding of price-fixing conspiracies among movie producers and chain exhibitors to fix uniform minimum theatre prices. The Court also held that certain discriminatory non-price advantages which the theatre chains extracted by means of their combined buying power and which were designed to destroy or injure the independent theatres were shown on

the record there to be unreasonable restraints of trade based upon the rule of reason.

Similarly, the cases cited by petitioners do not support their assertion (Pet. 13) that the lower courts have recognized "agreements to discriminate in price as between competing customers to be a form of price-fixing and a *per se* violation of Section 1." To the contrary, those cases involved claims of conspiracy for the purpose of monopolizing or destroying a competitor or its ability to compete in a given market. In sum, Seagram knows of no case and believes there is none which holds or suggests that supplier price support, even though known to be for discriminatory discounts favoring large volume customers at the expense of smaller competitors, is a *per se* violation.⁹

Conclusion

This case presents no legal issue under the Sherman Act worthy of review. The decisions of the district court and the court of appeals that Seagram's price reductions to support the discount programs independently formulated by its wholesaler were not vertical price-fixing and not in

9. Notwithstanding the agreement between the parties that the case would be tried solely on *per se* theories, both courts below also evaluated the evidence by applying the rule-of-reason standard. Because the record was clear that the purpose of the challenged arrangements was to increase the sales of the Seagram brands vis-a-vis the major competing brands and not to hurt the small retailers' ability to compete with the large volume stores and because the only effect shown was the lowering of retail prices to consumers and the enhancement of interbrand competition, both courts concluded that no unreasonable restraint of trade had been shown. (Pet. 19-20, 29)

per se violation of the Act pose no conflict among the circuits or with the controlling decisions of this Court. The writ should be denied.

Respectfully submitted,

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